RECORD AND BRIEFS

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Supreme Court, U.S.
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In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Motion To Dismiss

BRIEF OF *AMICUS CURIAE* EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 IN SUPPORT OF STATE OF TEXAS AND UNITED STATES IN OPPOSITION TO NEW MEXICO'S MOTION TO DISMISS TEXAS' COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION

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TABLE OF CONTENTS

Page

Table of Authorities ii

Introduction 1

Interest of the *Amicus Curiae* 3

Argument 6

I. New Mexico Is Violating its Compact Obligations by Facilitating Depletions Below Elephant Butte Dam and Depriving Texas of its Compact Apportionment 8

II. The Complaints of Texas and the United States Present Fundamental Questions Regarding the Interpretation and Enforcement of the Compact and not a Mere Reclamation Law Dispute 11

III. Neither the Lower Rio Grande General Stream Adjudication in New Mexico nor State Administration Can Resolve the Fundamental Compact Dispute that Texas and the United States Have Brought to this Court 16

Conclusion 23

TABLE OF AUTHORITIES

Page

CASES

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 7

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 7

Colorado v. New Mexico, 459 U.S. 176 (1982) 15

El Paso Cnty. Water Improvement Dist. No. 1 v. City of El Paso, 133 F. Supp. 894 (W.D. Tex. 1955), *aff'd as modified*, 243 F.2d 927 (5th Cir. 1957) 3

El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation Dist., No. EP07CA0027 (W.D. Tex. 2007) 5

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).....17

Texas v. New Mexico, 462 U.S. 554 (1983) 17

Texas v. New Mexico, 482 U.S. 124 (1987).....10, 14

CONSTITUTIONS

N.M. Const. Art. XXI, § 7 21

Tex. Const. Art. XVI, § 59 3

TREATIES

Convention with Mexico for the Upper Rio Grande, 34 Stat. 2953 (May 21, 1906) 4

Gadsden Treaty, 10 Stat. 1031 (Dec. 30, 1853).....20, 21

TABLE OF AUTHORITIES – Continued

Page

Treaty of Guadalupe Hidalgo, 9 Stat. 922 (July 4, 1848) 20

STATUTES

14 U.S.C. § 371, *et seq.* 4

43 U.S.C. § 521 3

Reclamation Act of 1902, 32 Stat. 388 (June 17, 1902) 4, 21, 22

Rio Grande Project Act, Act of February 25, 1905, ch. 798, 33 Stat. 814 ..... 4, 5, 22

Enabling Act for New Mexico, 36 Stat. 557, ch. 310 (June 20, 1910) 21

Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ..... *passim*

1905 N.M. Laws, ch. 102, § 22 ..... 18, 19

1907 N.M. Laws, ch. 49, § 40 19

Tex. Water Code § 55.364 3

Tex. Water Code § 55.185 4

RULES

S. Ct. R. 37 1

Fed. R. Civ. P. 12 7

BRIEF OF *AMICUS CURIAE* EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 IN SUPPORT OF STATE OF TEXAS AND UNITED STATES IN OPPOSITION TO NEW MEXICO'S MOTION TO DISMISS TEXAS' COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION

This *amicus curiae* brief by El Paso County Water Improvement District No. 1 ("EPCWID"), a political subdivision of the State of Texas, is filed by its authorized law officer in support of the State of Texas and United States in opposition to New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention and its Brief in Support ("Motion to Dismiss" and "N.M. Brief") pursuant to Supreme Court Rule 37.

INTRODUCTION

In this Original Action, the State of Texas seeks to enforce against the State of New Mexico the terms of the Rio Grande Compact ("Compact"), signed by the States of Colorado, New Mexico, and Texas on March 18, 1938, and ratified by Congress in the Act of May 31, 1939, ch. 155, 53 Stat. 785. Subsequent to Texas' filing of its Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion for Leave to File Complaint on January 8, 2013, the United States moved to intervene and filed a Complaint in Intervention. The Complaint in Intervention also seeks to require New Mexico to comply with its

obligations under the Compact as it relates to the Rio Grande Reclamation Project ("Rio Grande Project" or "Project"), a federal interstate reclamation project operated by the United States Bureau of Reclamation ("Bureau of Reclamation"). On January 27, 2014, the Court granted Texas leave to file its Complaint ("Texas Complaint"), with the right of New Mexico to file a motion to dismiss, and for Texas to respond to any such motion. On March 31, 2014, the Court granted the United States' Motion to Intervene and allowed the filing of the United States Complaint in Intervention ("U.S. Complaint"). New Mexico filed its Motion to Dismiss on April 30, 2014, which was supported by the City of Las Cruces' *Amicus Curiae* Brief in Support of State of New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention ("City of Las Cruces Brief").

The Motion to Dismiss should be denied. Both the Texas Complaint and the U.S. Complaint sufficiently allege a claim for interpretation and enforcement of the Rio Grande Compact. Only this Court can interpret and enforce the Compact.[1]

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[1] The background of both the Rio Grande Compact and the Rio Grande Project are set forth in the Texas Complaint, ¶¶ 2-16; Texas' Brief in Support of Motion for Leave to File Bill of Complaint, at 5-18; and the U.S. Complaint, ¶¶ 3-12.

INTEREST OF THE *AMICUS CURIAE*

EPCWID is a political subdivision of the State of Texas, organized under the Texas Constitution. Tex. Const. Art. XVI, § 59(b); *see El Paso Cnty. Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955), *aff'd as modified*, 243 F.2d 927 (5th Cir. 1957) (stating EPCWID is a political subdivision of the State of Texas, and EPCWID "is not only an arm of the State, but is fashioned to perform public service and duties of high importance to the welfare of the people of Texas"). EPCWID provides water for irrigation and municipal uses (pursuant to contracts entered into, with the approval of the Secretary of Interior, in accordance with 43 U.S.C. § 521). There are 69,010 acres of lands within EPCWID which are classified as irrigable. EPCWID provides, on average, over fifty percent of the annual water supply of the City of El Paso from EPCWID's allocation of Rio Grande Project water. Located in a part of the United States with an average rainfall of eight inches per year, EPCWID's users are dependent on Rio Grande water apportioned to Texas under the Compact, and allocated to EPCWID through the Project, for irrigation, crop production, and municipal uses. EPCWID was organized to "distribute and apportion all water acquired by the district under a contract with the United States in accordance with acts of Congress, rules and regulations of the secretary of the interior, and provisions of the contract." Tex. Water Code § 55.364. EPCWID is one of the two Project beneficiaries in the United States below

Elephant Butte Dam and above Fort Quitman, Texas; the other is Elephant Butte Irrigation District ("EBID"), serving southern New Mexico Project water users.

The Rio Grande Project was authorized in 1905 for the purpose of supplying irrigation water to EBID in southern New Mexico and EPCWID in western Texas, and, pursuant to international treaty, to Mexico. *See* Act of February 25, 1905, ch. 798, 33 Stat. 814 ("Rio Grande Project Act") (extending the Reclamation Act of 1902, 32 Stat. 388 (June 17, 1902) (codified as amended at 43 U.S.C. § 371, *et seq.*) ("Reclamation Act") to Texas and authorizing the construction of what is now Elephant Butte Dam to provide water for irrigation in Texas and New Mexico); Convention with Mexico for the Upper Rio Grande, 34 Stat. 2953 (May 21, 1906). The Rio Grande Compact was designed to ensure that the Project remained viable by requiring New Mexico's Rio Grande Compact deliveries into the Project at Elephant Butte Reservoir, where the water delivered would become Project water to be allocated and delivered by the Bureau of Reclamation to the Project beneficiaries.

EPCWID provides water to its users pursuant to its authority under Texas law and contracts with the Bureau of Reclamation. *See* Tex. Water Code § 55.185 (authorizing EPCWID to enter into contracts with the Bureau of Reclamation). These contracts concern allocation, delivery, and repayment costs related to EPCWID's water from the Rio Grande Project.

EPCWID has a contract with EBID, approved by the United States, dated February 16, 1938, which provides, in part, that 67/155th of the Rio Grande Project water is to be distributed to EPCWID, and 88/155th to EBID.[2] In 2007, EPCWID filed a lawsuit in the Western District of Texas against EBID and the Bureau of Reclamation, seeking to enforce the obligations of the United States to allocate and deliver EPCWID's Project water. *El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation Dist.*, No. EP07CA0027 (W.D. Tex. 2007). EPCWID requested that the court declare the contractual obligations of the United States and compel the United States to allocate and deliver Project water in accordance with the Rio Grande Project Act and the contracts between and among EPCWID, EBID, and the United States. The litigation culminated in a settlement agreement that included an operating agreement for the Project ("2008 Operating Agreement") which establishes a method for the Bureau of Reclamation to allocate among EBID, EPCWID, and Mexico and deliver Project water released from Elephant Butte Dam. New Mexico's violations of the Rio Grande Compact by allowing depletions of Project water in New Mexico below Elephant Butte Reservoir to which EBID, EPCWID, and Mexico are entitled, and New Mexico's interference with the operation of the Project by the United States has, and will continue to have,

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[2] A copy of this contract is contained in the Appendix to the United States' Brief *Amicus Curiae*. App. 1a.

detrimental effects on the continued viability of the Rio Grande Project and the 2008 Operating Agreement.

ARGUMENT

The fundamental question properly brought by both Texas and the United States to this Court concerns the relationship of the Rio Grande Compact, and the rights and the obligations of Texas and New Mexico thereunder, to the Rio Grande Project. This relationship – the Project's existence, ability to function, and the benefits it was designed to provide at the time of the Compact – is the very basis for the Compact rights of Texas. New Mexico's Compact delivery into the Project has always served, and been intended to serve, as Texas' Compact apportionment. Now, Texas and the United States have asked the Court to resolve the dispute with New Mexico as to the rights of Texas and the nature of Texas' apportionment. Texas appropriately argues that once New Mexico makes its Compact delivery, it cannot take back, through downstream depletions, the very same waters claimed by New Mexico to have satisfied its Compact delivery obligation. Tex. Compl. ¶ 18. New Mexico rejects this view, arguing instead that it can deliver to Project storage as required by the Compact, and because there is no state-line delivery requirement and the Project operates in part within New Mexico's borders, it can then take back the water it

delivers and use that water for its own purposes. N.M. Brief at 59.

New Mexico's Motion to Dismiss does not demonstrate that the Complaints of Texas and the United States fail to state a claim under which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). For purposes of resolving the Motion to Dismiss, the Court accepts as true the factual allegations contained in the Texas Complaint and U.S. Complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). New Mexico, however, attempts to avoid this standard by arguing the case on the merits, relying on selective extrinsic evidence and erroneous Compact interpretation. In so doing, New Mexico misrepresents the Complaints of Texas and the United States by stating they seek a state-line Compact delivery, N.M. Brief at 20, 28-29; misconstrues the importance of the Project vis-à-vis definition and establishment of Compact rights and obligations, N.M. Brief at 48-52, 59-64; attempts to transmute the Texas and United States Complaints into a reclamation contract dispute, *id.*; and continues to argue that the issues raised in the Complaints can be resolved through application of New Mexico state law and allowing New Mexico state adjudication and administration of the Project water supply, including the Compact rights of Texas, N.M. Brief at 63-64. New Mexico's Motion to Dismiss is a bald

attempt to avoid adjudication on the merits of the significant Compact dispute raised by the Complaints by ignoring the importance of the Project to Compact rights and obligations. Contrary to New Mexico's protestations, and as pled in the Complaints, this case presents a fundamental interstate Compact dispute, which this Court and only this Court can, and should resolve.

I. New Mexico Is Violating its Compact Obligations by Facilitating Depletions Below Elephant Butte Dam and Depriving Texas of its Compact Apportionment.

New Mexico's primary argument in its Motion to Dismiss is based on a fallacy: that the Texas Complaint should be dismissed because it requests establishment or enforcement of a state-line delivery which does not exist under the Compact. *See* N.M. Brief at 20, 28-29; *see also* City of Las Cruces Brief at 14-15. In fact, the Texas Complaint does not request enforcement or establishment of a state-line delivery. To the contrary, the Complaint clearly acknowledges that there is no Compact state-line delivery. Tex. Compl. ¶ 10. Rather, Texas and the United States allege New Mexico has violated the Rio Grande Compact by unlawfully allowing depletions of the Compact deliveries it makes to the Rio Grande Project. *Id.* ¶¶ 10-11, 13, 18-19; U.S. Compl. ¶¶ 13-14. New Mexico has violated and continues to violate its Compact delivery obligation by delivering water into Elephant Butte Reservoir, but subsequently allowing users within the

geographic territory of New Mexico to divert and intercept surface water and pump water hydrologically connected to the Rio Grande when deliveries are released from Project storage. Tex. Compl. ¶¶ 18-21; U.S. Compl. ¶¶ 13-14.

New Mexico's misleading portrayal of the Texas Complaint as seeking a state-line delivery is nothing more than a bare attempt to have the Court ignore the importance of the relationship between the Compact and the Project with respect to Texas' Compact right. The very reason there is no state-line delivery is because the compacting parties agreed that the delivery point should be the Rio Grande Project, which would allow delivery of Texas' apportionment through the operation of the Project by the United States. *See* Tex. Compl. ¶¶ 11, 13; U.S. Compl. ¶¶ 5-7. The Project pre-existed the Compact, and it was therefore recognized and accepted by the Compact drafters that Texas' apportionment and deliveries would be that afforded by the Project and delivered to the Project. *See* Tex. Compl. ¶ 11. The Compact accordingly recognizes that New Mexico's deliveries to the Project, after appropriate accounting, become "useable water" for both Compact and Project purposes, *see* Compact Art. I(k), (l), and do not, as New Mexico wishes, remain water available for New Mexico to further allocate to New Mexico non-Project users.

New Mexico insists it has no "affirmative duty" with regard to delivery of water to Texas. Motion to Dismiss ¶ 3; N.M. Brief at 48. What New Mexico chooses to ignore however, is that it has an

affirmative duty not to violate its delivery obligation by interfering with the right and ability of Texas to receive the delivery through the Project, of its share of Rio Grande water apportioned by the Compact. *See Texas v. New Mexico*, 482 U.S. 124, 129 (1987) (stating even "good-faith differences about the scope of contractual undertakings do not relieve either party from performance"). New Mexico essentially argues that it can make its delivery to Elephant Butte Reservoir and then take the water back once released from Elephant Butte Dam. Under New Mexico's view it is permissible for New Mexico to permit New Mexico water users to abscond with Compact water belonging to the Project beneficiaries and due to Texas under the Compact. This is not only contrary to the intent of the parties to the Compact but would lead to an absurd result. The Project and the Compact were intended to allow Texas to receive its Compact apportionment, not to allow New Mexico to develop additional water supplies for New Mexico from its Compact delivery intended for Texas. *See* Memorandum in Support of Motion of the United States to Intervene as a Plaintiff, at 3 (stating the Compact was signed approximately one month after the execution of the 1938 contract among EBID, EPCWID, and the United States, confirming the acreage for each State which would be served by deliveries to the Project by New Mexico); U.S. Compl. ¶ 8. Texas and the United States accordingly assert that this is not what the Compact intended. Tex. Compl. ¶ 18; U.S. Compl. ¶ 13.

The language of the Compact and its relationship to the Project make clear that New Mexico's Compact delivery must be used for the Project, and is not available for New Mexico to reallocate. *See* Compact Art. IV (requiring New Mexico to deliver its Compact obligation at Elephant Butte Reservoir); Art. I(k) (defining "project storage" as the combined capacity of Elephant Butte Reservoir and other reservoirs "above the first diversion to lands of the Rio Grande Project"); Art. I(l) (defining "usable water" as water in project storage). These terms would have no meaning under the Compact if New Mexico could deliver its Compact obligation to the Project and then take it back before it could be placed into the service of the Project for the benefit of the Project beneficiaries and the State of Texas. The Complaints more than sufficiently allege that New Mexico is in violation of the Compact by permitting water users within New Mexico to use the water apportioned to Texas by the Compact.

II. The Complaints of Texas and the United States Present Fundamental Questions Regarding the Interpretation and Enforcement of the Compact and not a Mere Reclamation Law Dispute.

New Mexico's Motion to Dismiss attempts to reframe the significant Compact questions presented in the Texas and United States Complaints as mere disputes arising under federal reclamation law. N.M. Brief at 59. As set forth above, the water supply of the

Project is inextricably linked to the waters apportioned to Texas by the Rio Grande Compact. This does not mean that Texas or the United States fails to state a claim relating to the Compact, or that this case is not within the Court's original jurisdiction. The Compact is necessary to ensure the Project receives its annual supply of water, and the Project is necessary to ensure Texas' Compact apportionment is delivered to users in Texas. New Mexico, however, focuses on the existence of contracts to deliver the Project water to argue no Compact claim is stated by the Complaints.

It is undisputed that Project water is delivered to users in EBID and EPCWID pursuant to contracts, including the 1938 contract and the 2008 Operating Agreement. *See* U.S. Compl. ¶¶ 8, 12. It is further undisputed, as the United States establishes in its Complaint, that a contract is required to "receive deliveries of water, including seepage and return flow, from a Reclamation project," and that the only such contract in New Mexico is between the Secretary of the Department of the Interior and EBID. *Id.* ¶ 12. The existence of the Project, which delivers to Texas its Compact apportionment, does not transmute a Compact dispute into a reclamation law dispute. Rather, this case presents the unique circumstance of interpretation and enforcement of the Rio Grande Compact, which necessarily includes consideration of the Rio Grande Project, releases from Project storage, Project supply, contracts relating to releases and supply, and whether New Mexico is entitled to claim

credit for the delivery of its Compact requirement into the Elephant Butte Reservoir and then permit such water to be removed from the Rio Grande basin below the reservoir for use by New Mexico non-Project water users.

The United States appropriately asserts two distinct interests in this case, both of which are expressly related to New Mexico's Compact compliance (or lack thereof). First, this Court's interpretation of the Compact will affect how the Bureau of Reclamation calculates diversion allocations in determining Project supply. U.S. Motion at 2; U.S. Brief at 5; U.S. Compl. ¶ 14. Second, the United States has a distinct interest in ensuring that non-Project water users, that is users other than EPCWID or EBID, do not intercept or interfere with Project water intended for Project beneficiaries. U.S. Motion at 2; U.S. Brief at 5; U.S. Compl. ¶ 13. The ability of EPCWID, as the Project beneficiary in Texas, to receive its allocation of Project supply unimpeded by users in New Mexico is what Texas bargained for and received under the Rio Grande Compact.

With respect to the first interest, this Court's determination of New Mexico's obligations under the Compact will affect administration of the Project. The Project is currently operated in accordance with the terms agreed to by EPCWID, EBID, and the United States in the 2008 Operating Agreement. The 2008 Operating Agreement defines and protects the rights of EPCWID and EBID to their respective shares of the Project water supply. The United States Complaint

seeks to enjoin New Mexico from allowing non-Project water users to interfere with the delivery of Project water both within New Mexico and to the State of Texas. *See* U.S. Compl. ¶¶ 13-15. The United States alleges that New Mexico has permitted such interference by allowing the interception of both surface water and hydrologically connected groundwater, and that such interception affects the rights of the United States in and to the Project and the ability of the United States to deliver sufficient Project water to EBID, EPCWID and to Mexico. *Id.*

With respect to the second interest, when water users who do not have valid contracts with the Bureau of Reclamation divert and use Project water, the operation of the entire Project is at risk. The Operating Agreement assumes New Mexico's compliance with its Rio Grande Compact delivery obligations. New Mexico's current actions, however, are in derogation of the requirements imposed on it by the Compact, its contract with Texas and Colorado to govern the use by the three sister States of the Rio Grande's waters. *See Texas v. New Mexico*, 482 U.S. at 128 ("[A] compact when approved by Congress becomes a law of the United States, but a Compact is, after all, a contract.") (internal citations, quotation marks, and alterations omitted). The interpretation and enforcement of the Compact must take into account the operation of the Project pursuant to the Operating Agreement. "[T]he equities supporting the protection of existing economies will usually be compelling. The harm that may result from disrupting established uses is typically certain and immediate, whereas the

potential benefits from a proposed diversion may be speculative and remote." *Colorado v. New Mexico*, 459 U.S. 176, 187 (1982).

As described in Texas' and the United States' Complaints, New Mexico's acts and conduct in failing to comply with its obligations under the Compact significantly impair the operation of the Project and the ability of the United States to perform its contractual obligations to EPCWID. Tex. Compl. ¶¶ 24-25; U.S. Compl. ¶ 14. These distinct interests of the United States and the Compact questions Texas has brought to this Court all relate to interpretation and enforcement of the Compact and do not rely on a reclamation law or contracts. Rather, both the Texas and the United States Complaints seek to interpret and enforce New Mexico's Compact obligations in order that the United States and others can ensure compliance with existing contracts and obligations. Absent Compact compliance by New Mexico, the Project will be undermined and Texas and EPCWID, the Texas Project beneficiary, will not receive the water to which Texas is entitled under the Compact.[3]

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[3] Ironically, in arguing against this Court's acceptance of jurisdiction over the Texas Complaint, New Mexico originally took the position that the United States was an indispensable party to resolve Texas' allegations with regard to Compact violations. *See* New Mexico's Brief in Opposition to Texas' Motion for Leave to File Complaint 31-34. Now that the United States has intervened, New Mexico argues that its presence and the essential issues it raises, improperly expand this Court's original jurisdiction. N.M. Brief at 63-64.

III. Neither the Lower Rio Grande General Stream Adjudication in New Mexico nor State Administration Can Resolve the Fundamental Compact Dispute that Texas and the United States Have Brought to this Court.

New Mexico spends a large proportion of its Motion to Dismiss arguing that the allegations of Texas and the United States regarding Compact violations can somehow readily be resolved in state court through application of state law, primarily determination of the Project right in the state general stream adjudication and state administration. N.M. Brief at 48-64. These arguments are misguided and misconstrue the allegations of both Complaints. New Mexico made these same arguments in its opposition to the Court's acceptance of Texas' Complaint, and they should be rejected now as they were in the Court's consideration of Texas' Motion for Leave to File Bill of Complaint.

Neither Complaint seeks an adjudication or determination of the rights in the Project. Rather, the Complaints set forth the necessary interdependence of the rights and obligations under the Compact, with the operations of the Project, and ask this Court to resolve that issue. As set forth in the Texas Complaint, the Compact water allocated to Texas is in essence Project water and vice versa: "Rio Grande Compact [water] . . . is allocated and belongs to the Rio Grande Project beneficiaries in southern New Mexico and in Texas. . . ." Tex. Compl. ¶ 4. The water

delivered to the Project at Elephant Butte Reservoir is not New Mexico's to allocate in a state general stream adjudication, and thus a general stream adjudication cannot undermine Texas' rights. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (holding the equitable apportionment of an interstate stream by an interstate compact "is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact"). Rather, the Rio Grande Compact, an interstate compact with the status of federal law, mandates that the Project right, however adjudicated, cannot be diminished by New Mexico state based water rights authorized under state law. *See Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (stating that no court may order relief inconsistent with an interstate compact).

Moreover, New Mexico erroneously argues that the United States' Project Rights were acquired under New Mexico state law and that therefore state law can dictate the administration and operation of the Project. N.M. Brief at 52-58. However, the United States' rights in the Project were secured for the Project under federal law and the Bureau of Reclamation, not the State of New Mexico, is charged with Project operations. In 1906, and again in 1908, the predecessor to the Bureau of Reclamation, the Department of the Interior United States Geological Survey, Reclamation Service, provided notice to the New Mexico Territorial Irrigation Engineer that the United States had withheld all the unappropriated

waters of the Rio Grande for the federal purposes of the Project. Tex. Compl. ¶ 7. The 1906 Notice stated in part:

> [Y]ou are hereby notified that the United States intends to utilize the following described waters, to wit:
>
> A volume of water equivalent to 730,000 acre-feet per year requiring a maximum diversion or storage of 2,000,000 miner's inches said water to be diverted or stored from the Rio Grande River at a point described as follows:
>
> Storage dam . . . and diversion dams below in Palomas, Rincon, Mesilla, and El Paso valleys in New Mexico and Texas.
>
> It is, therefore, requested that the waters above described be withheld from further appropriation and that the rights and interests of the United States in the premises be otherwise protected as contemplated by the statute above cited.

See N.M. Brief App. 8-10. The 1906 notice was given pursuant to Section 22 of Chapter 102 of the territorial laws enacted in 1905 by the 36th Legislative Assembly of the Territory of New Mexico. The language quoted is mandatory, not precatory. The act provided that:

> Whenever the proper officers of the United States authorized by law to construct irrigation works, shall notify the territorial irrigation engineer that the United States intends

> to utilize certain specified waters, the waters so described, and unappropriated at the date of such notice, shall not be subject to further appropriations under the laws of New Mexico, and no adverse claims to the use of such waters, initiated subsequent to the date of such notice, shall be recognized under the laws of the territory. . . .

1905 N.M. Laws, ch. 102, § 22.

Louis C. Hill, supervising engineer, sent a second notice to the New Mexico Territorial Engineer dated April, 1908, pursuant to Section 40 of Chapter 49 of the laws enacted in 1907 by the 37th Legislative Assembly of the Territory of New Mexico, 1907 N.M. Laws, ch. 49, § 40, which stated, in part:

> In pursuance of the above statute of the Territory you are hereby notified that the United States intends to utilize the following described waters, to wit:
>
> All the unappropriated water of the Rio Grande and its tributaries, said water to be diverted or stored from the Rio Grande River at a point described as follows:
>
> Storage dam about nine miles west of Engle, New Mexico, with capacity for two million (2,000,000) acre feet, and diversion dams below in Palomas, Rincon, Mesilla and El Paso Valleys in New Mexico and Texas.
>
> It is therefore requested that the waters above described be withheld from further appropriation and that the rights

> and interests of the United States in the premises be otherwise protected as contemplated by the statue above cited.

See N.M. Brief App. 11-13.

The only differences between the 1906 and the 1908 notices were that the 1908 notice: 1) contained no water volume limitation, referring to "All the unappropriated water of the Rio Grande and its tributaries . . . "; and 2) "the proper officers of the United States" had three years from the date of the notice within which to file "plans for the proposed work, in the office of the Territorial Engineer for his information, and no adverse claim to the use of the water required in connection with such plans, initiated subsequent to the date of such notice, shall be recognized under the laws of the Territory. . . ." Such officers did file the plans for the "proposed work" within three years from the date of the notice.

Neither the 1906 nor the 1908 Notice requested or referred to an "appropriation of water," and they were not dependent upon any ruling from the Territorial Engineer. Instead, the notices were simply notifications to the Territorial Engineer, and thereby to the inhabitants of the Territory of New Mexico (and, subsequently, the State of New Mexico), that the United States was withholding all of the water to which it had been entitled pursuant to the Treaty of Guadalupe Hidalgo, between Mexico and the United States, proclaimed July 4, 1848, 9 Stat. 922; as expanded by the Gadsden Treaty between Mexico and

the United States, proclaimed December 30, 1853, 10 Stat. 1031. Pursuant to such treaties, the United States acquired ownership and dominion over all of the present State of New Mexico, including all of the surface and all of the sub-surface (including, without limitation, all minerals and waters).

Subsequently, under the Enabling Act for New Mexico, 36 Stat. 557, ch. 310 (June 20, 1910) New Mexico was allowed to become a state, but subject to all of the terms and conditions of the Enabling Act, the terms of which are incorporated into the 1912 Constitution of the State of New Mexico. The Second clause of the Seventh provision of the Enabling Act provides:

> That there be and are reserved to the United States, with full acquiescence of the State, all rights and powers for the carrying out of the provisions by the United States of (the Reclamation Act of 1902) . . . to the same extent as if said State had remained a Territory.

N.M. Const. Art. XXI, § 7. The United States retained and still holds for the benefit of the Project beneficiaries, all of the Rio Grande water which the United States acquired in 1848 and 1853, and which was legally unappropriated by the date of the 1908 notice.

Based on the unique history of the Rio Grande Project, the water supply for the Project is governed by federal law, including the Rio Grande Compact which subsequently apportioned Project water to

Texas as its Compact right. The United States continues to hold rights to the Project water supply, and, acting through the Secretary of the Interior, it can utilize such water in any manner consistent with the Reclamation Act, the Rio Grande Project Act, and the Rio Grande Compact. The United States can, and does, place the water supply into service for the Project through the Project works, and no one else (absent a contract with the United States), has the right to divert, use, or intercept such water unless and until the United States has finished use of the water, including tributary inflow, underflow of the river, return flows, and accretions and has met delivery obligations to Texas and treaty delivery obligations to Mexico. State law, either through adjudication or administration, cannot diminish the rights of the United States to operate the Project and make full use of the Project water supply, or the rights of Texas pursuant to the Compact.

CONCLUSION

For the reasons stated herein, and in support of the responses of the State of Texas and the United States, EPCWID respectfully requests the Court deny the Motion to Dismiss.

Respectfully submitted,

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